(1) Supreme Court, U.S.
FILED

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CASE NO. OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

John Nierengarten and
Betty Nierengarten,

Petitioners,

v.

State of Wisconsin, Department
of Health and Social Services,

Respondents.

**Petition for Review to the
Wisconsin Supreme Court**

Petition for Writ of Certiorari

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5 cpies

QUESTION PRESENTED

Whether the requirement under Wisconsin law that in order to qualify for federally subsidized adoption assistance, applications must be completed prior to the finalization of the adoption, irregardless of any extenuating circumstances, is inconsistant with the purposes of 42 U.S.C. § 673 and policy interpretations of the U.S. Department of Health and Human Services, ACF-PIQ-92-02 and ACFY-PIQ-88-06, and whether that Wisconsin requirement should continue to be applied.

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CASE NO. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

John Nierengarten and
Betty Nierengarten,

Petitioners,

v.

State of Wisconsin, Department
of Health and Social Services,

Respondents.

**Petition for Review to the
Wisconsin Supreme Court**

The Petitioners, John Nierengarten and Betty Nierengarten, respectfully pray that a writ of certiorari issue to review the order and judgment of the Wisconsin Supreme Court, rendered in this proceeding on June 11, 1996.

OPINION BELOW

The order of the Wisconsin Supreme Court is unpublished, and the opinion of the Wisconsin Court of Appeals is also unpublished. Both appear in the appendix hereto. (A-2 and A-4, respectively). There also exists a memorandum opinion of the Circuit Court of Pierce County, Wisconsin, and an administrative decision of the Wisconsin Department of Health and Human Services. These also appear in the appendix hereto. (A-9 and A-12, respectively).

JURISDICTION

The petitioners are seeking review of the Wisconsin Supreme Court order dated June 11, 1996. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (a).

STATUTORY PROVISIONS INVOLVED

Sec. 48.975., Wis. Stats.

(1) Definition. In this section, "adoption assistance" means payments by the department to the adoptive or proposed adoptive parents of a child which are designed to assist in the cost of care of that child after an agreement under sub. (4) has been signed and the child has been placed for adoption with the adoptive or proposed adoptive parents.

(2) Applicability. The department may provide adoption

assistance only when it has determined that such assistance is necessary to assure the child's adoption.

(3) Types. The department may provide adoption assistance for maintenance, medical care or nonrecurring adoption expenses, or for any combination of those types of adoption assistance, according to the following criteria:

(a) Maintenance. For support of a child who was in foster care or treatment foster care immediately prior to adoption, the adoption assistance for maintenance shall be equivalent to the amount of that child's foster care or treatment foster care payment. For support of a child not in foster care or treatment foster care immediately prior to placement with a subsidy, the adoption assistance for maintenance shall be equivalent to the uniform foster care rate.

(b) Medical. The adoption assistance for medical care shall be sufficient to pay expenses due to a physical, mental or emotional condition of the child which is not covered by a health insurance policy insuring the child or the parent.

(c) Nonrecurring adoption expenses. Subject to any maximum amount provided by the department by rule promulgated under sub. (5), the adoption assistance for nonrecurring adoption expenses shall be sufficient to pay the reasonable and necessary adoption fees, court

costs, legal fees and other expenses that are directly related to the adoption of the child and that are not incurred in violation of any state or federal law.

(4) Procedure. A written agreement to provide adoption assistance shall be made prior to legal adoption only for children in the guardianship of the department or other agency authorized to place children for adoption or for children in the guardianship of an American Indian tribal agency in this state. The adoption assistance may be continued after the child reaches the age of 18 if that child is a full-time high school student.

(5) Rules. The department shall promulgate rules necessary to implement this section.

42 U.S.C. § 673.

(a) Agreements with adoptive parents of children with special needs; State payments; qualifying children; amount of payments; changes in circumstances; placement period prior to adoption; nonrecurring adoption expenses

(1)(A) Each State having a plan approved under this part shall enter into adoption assistance agreements (as defined in section 675(3) of this title with the adoptive parents of children with special needs.

(B) Under any adoption assistance agreement entered into by a State with parents who adopt a child with special needs, the State--

(i) shall make payments of nonrecurring adoption expenses incurred by or on behalf of such parents in connection with the adoption of such child, directly through the State agency or through another public or nonprofit private agency, in amounts determined under paragraph (3), and

(ii) in any case where the child meets the requirements of paragraph (2), may make adoption assistance payments to such parents, directly through the State agency or through another public or nonprofit private agency, in amounts so determined.

(2) For purposes of paragraph (1)(B)(ii), a child meets the requirements of this paragraph if such child--

(A)(i) at the time adoption proceedings were initiated, met the requirements of section 606(a) of this title or section 607 of this title or would have met such requirements except for his removal from the home of a relative (specified in section 606(a) of this title), either pursuant to a voluntary placement agreement with respect to which Federal payments are provided under section 674 (or 603) of this title or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child,

(ii) meets all of the requirements of subchapter XVI of this chapter with respect to eligibility for supplemental security income benefits, or

(iii) is a child whose costs in a foster family home or child-care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent as provided in section 675(4)(B) of this title,

(B)(i) received aid under the State plan approved under section 602 of this title in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

(ii) (I) would have received such aid in or for such month if application had been made therefor, or (II) had been living with a relative specified in section 606(a) of this title within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made, or

(iii) is a child described in subparagraph (A)(ii) or (A)(iii), and

(C) has been determined by the State, pursuant to subsection (c) of this section, to be a child with special needs.

The last sentence of section 672(a) of this title shall apply, for purposes of subparagraph (B), in any case where the child is an alien described in that sentence.

(3) The amount of the payments to be made in any case under clauses (i) and (ii) of paragraph (1)(B) shall be determined through agreement between the adoptive parents and the State or local agency administering the program under this section, which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents (which may be specified in the adoption assistance agreement), depending upon changes in such circumstances. However, in no case may the amount of the adoption assistance payment made under clause (ii) of paragraph (1)(B) exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home.

(4) Notwithstanding the preceding paragraph, (A) no payment may be made to parents with respect to any child who has attained the age of eighteen (or, where the State determines that the child has a mental or physical handicap which warrants the continuation of

assistance, the age of twenty-one), and (B) no payment may be made to parents with respect to any child if the State determines that the parents are no longer legally responsible for the support of the child or if the State determines that the child is no longer receiving any support from such parents. Parents who have been receiving adoption assistance payments under this section shall keep the State or local agency administering the program under this section informed of circumstances which would, pursuant to this subsection, make them ineligible for such assistance payments, or eligible for assistance payments in a different amount.

(5) For purposes of this part, individuals with whom a child (who has been determined by the State, pursuant to subsection (c) of this section, to be a child with special needs) is placed for adoption in accordance with applicable State and local law shall be eligible for such payments, during the period of the placement, on the same terms and subject to the same conditions as if such individuals had adopted such child.

(6)(A) For purposes of paragraph (1)(B)(i), the term "nonrecurring adoption expenses" means reasonable and necessary adoption fees, court costs, attorney fees, and other expenses which are directly related to the legal adoption of a child with special needs and which are not incurred in violation of State or Federal law.

(B) A State's payment of nonrecurring adoption expenses under an adoption assistance agreement shall be treated as an expenditure made for the proper and efficient administration of the State plan for purposes of section 674(a)(3)(E) of this title.

(b) Aid to families with dependent children

For purposes of subchapters XIX and XX of this chapter, any child--

(1)(A) who is a child described in subsection (a)(2) of this section, and

(B) with respect to whom an adoption assistance agreement is in effect under this section (whether or not adoption assistance payments are provided under the agreement or are being made under this section), including any such child who has been placed for adoption in accordance with applicable State and local law (whether or not an interlocutory or other judicial decree of adoption has been issued), or

(2) with respect to whom foster care maintenance payments are being made under section 672 of this title,

shall be deemed to be a dependent child as defined in section 606 of

this title and shall be deemed to be a recipient of aid to families with dependent children under part A of this subchapter in the State where such child resides. For purposes of the preceding sentence, a child whose costs in a foster family home or child-care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent, as provided in section 675(4)(B) of this title, shall be considered a child with respect to whom foster care maintenance payments are being made under section 672 of this title.

(c) Children with special needs

For purposes of this section, a child shall not be considered a child with special needs unless--

(1) the State has determined that the child cannot or should not be returned to the home of his parents; and

(2) the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter, and (B) that, except where it

would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter.

STATEMENT OF THE CASE

Benjamin Nierengarten is the adopted child of John and Betty Nierengarten. Benjamin Nierengarten was born in Korea, and the Nierengarten family worked with Lutheran Social Services of Wisconsin and Upper Michigan, Inc. to adopt Benjamin. Benjamin was placed with the Nierengartens in April of 1987, when he was approximately four years old. He has exhibited symptoms of psychological problems since his placement. The adoption was finalized in November of 1987.

Subsequent to his adoption, Benjamin was diagnosed with bipolar disorder, attention deficit hyperactivity disorder, post traumatic stress disorder and mathematics disorder. Benjamin is currently taking medication and being seen by a therapist for these problems. The Nierengartens are experiencing great financial difficulties meeting the needs of Benjamin and their other three children.

The Nierengartens applied to the Wisconsin Bureau of Children, Youth and Families for adoption assistance in August of 1994. When Benjamin was placed with the Nierengarten family, they were told by the adoption agency that the adoption assistance program did not apply in their situation. Their application for adoption assistance was denied in October of 1994. The Department stated the request for adoption assistance was not timely, and that adoption assistance was not necessary to assure the adoption of the child.

The Nierengartens appealed the decision of the Department, and a hearing before an administrative law judge was held in February of 1995. The administrative law judge concluded the request for adoption assistance was not timely made, and upheld the decision of the Department. (A-14.)

The Nierengartens then appealed to the Pierce County Circuit Court. The Circuit Court also concluded the request for adoption assistance was not timely made, and affirmed the decision of the Department to deny adoption assistance. (A-10.)

The Nierengartens next appealed to the Wisconsin Court of Appeals. The Court of Appeals found the Wisconsin Department of Health and Social Services correctly interpreted the law to require the application for adoption assistance be made before the adoption is finalized. (A-4.) The Court of Appeals concluded that since it was

undisputed the application for adoption assistance was made after the adoption was finalized, it was properly denied. Id. The Court of Appeals also concluded its duty was to ascertain legislative intent by virtue of the plain statutory language, and did not specifically consider the consistency of the denial of adoption assistance with Congress' intent in enacting 42 U.S.C. § 673, or with two policy interpretations of the U.S. Department of Health and Human Services, ACF-PIQ-92-02 and ACFY-PIQ-88-06. Id.

The Nierengartens then petitioned for review to the Wisconsin Supreme Court. The Wisconsin Supreme Court denied the petition for review. (A-3.)

REASONS FOR GRANTING THE WRIT

I. THE REQUIREMENT UNDER WISCONSIN LAW THAT IN ORDER TO QUALIFY FOR ADOPTION ASSISTANCE, APPLICATIONS MUST BE COMPLETED PRIOR TO THE FINALIZATION OF THE ADOPTION, IRREGARDLESS OF ANY EXTENUATING CIRCUMSTANCES, IS INCONSISTENT WITH THE PURPOSES OF 42 U.S.C. § 673.

The requirement under Wisconsin law that in order to qualify for adoption assistance, applications must be completed prior to the finalization of the adoption, irregardless of any extenuating

circumstances, is inconsistent with the purposes of 42 U.S.C. § 673. As it stands now, Wisconsin law denies adoption assistance to all families who fail to apply for the program before the adoption is finalized. This is true even if the adopted child would have qualified for adoption assistance at the time of adoption, but the parents were unaware of that fact.

The Wisconsin adoption assistance program developed as a result of federal law. 42 U.S.C. § 673 (a) (1) (A) provides,

> Each State having a plan approved under this part ***shall*** enter into adoption assistance agreements as defined in section 675 (3) of this title with the adoptive parent of children with special needs. (emphasis added).

Wisconsin law provides, "For proper construction of a statute it is not enough that only its terms be considered. Its effect must be deduced from a consideration of it and other statutes on the same subject, Ocean A. & G. Corp. v. Combined Locks Paper Co., 1916, 162 Wis. 255, 156 N.W. 156, and the applicable rules of the common law." Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W. 2d 528 (1970), *citing* Chapman v. Zakzaska, 273 Wis. 64, 76 N.W. 2d 537 (1956). Consequently, in determining the validity of the Wisconsin statute and administrative regulations requiring that under all circumstances the application for adoption assistance be made before the adoption is

finalized, the intention of Congress in enacting 42 U.S.C. § 673 should be considered.

The purposes of 42 U.S.C. § 673 are included in the June 24, 1992 Policy Interpretation of the U.S. Department of Health and Human Services. (A-21.) First, the adoption assistance program was intended to increase the numbers of children in permanent adoptive care, rather that foster care. Permanent adoptive care, even with assistance, is more economically efficient for the state than foster care. Second, the program was intended to encourage the adoption of hard to place children. By denying adoption assistance to the Nierengartens, Wisconsin is not furthering the goals of 42 U.S.C. § 673. In fact, those goals are being undermined.

Increasing the numbers of children in permanent adoptive care is sound economic policy. As stated, permanent adoptive care, even with assistance, is more economically efficient for the State than foster care. While the Nierengartens do not intend to give Benjamin up, other families in similar situations may be forced to by financial constraints, and the needs of other members of their families, to place adopted children who have special needs at the time of their adoption, but are not diagnosed until after the adoption is finalized, into the foster care system. By denying requests for adoption assistance based on the timing of the request, when the child otherwise qualifies for the program, Wisconsin is undermining the goal of increasing the numbers

of children with special needs in permanent adoptive care.

Encouraging the adoption of hard to place children is also hampered by denying a request for adoption assistance because the request was not made before the adoption was finalized. The Nierengartens are not proposing that children who do not otherwise qualify should be awarded adoption assistance. The Nierengartens are only arguing that if a child otherwise qualifies for the program, the fact the request was not made before the adoption was finalized should not be an absolute bar.

II. THE REQUIREMENT UNDER WISCONSIN LAW THAT IN ORDER TO QUALIFY FOR ADOPTION ASSISTANCE, APPLICATIONS MUST BE COMPLETED PRIOR TO THE FINALIZATION OF THE ADOPTION, IRREGARDLESS OF ANY EXTENUATING CIRCUMSTANCES, IS INCONSISTENT WITH THE POLICY INTERPRETATIONS OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ACF-PIQ-92-02 AND ACFY-PIQ-88-06.

The requirement under Wisconsin law that in order to qualify for adoption assistance, applications must be completed prior to the finalization of the adoption, irregardless of any extenuating circumstances, is inconsistent with the policy interpretations of the U.S. Department of Health and Human Services, ACF-PIQ-92-02 and

ACFY-PIQ-88-06. Sec. 48.975, Wis. Stats., combined with administrative regulations HSS 50.03 and 50.04, require that an application for adoption assistance be made before the adoption is finalized. The record of this case establishes this requirement is interpreted strictly in Wisconsin. Applications for adoption assistance must be made prior to the adoption finalization, and no exceptions will be made even in cases where there are extenuating circumstances and the child otherwise qualifies for the program. However, two policy interpretations of the U.S. Department of Health and Human Services support the proposition that when there are extenuating circumstances, a request for adoption assistance can be made after the adoption is finalized. (A-21 and A-27.)

In an interpretation issued December 2, 1988, ACFY-PIQ-88-06, the agency said that even though 45 C.F.R. 1356.40 (b) (1) required the adoption assistance agreement to be entered into before the final decree of adoption (just like the Wisconsin rules), extenuating circumstances would allow the parents to request a hearing, and if all the facts relevant to eligibility were not presented at the time of the initial request, the decision to deny benefits could be reversed. When the Nierengartens decided to adopt another child, they requested a healthy child. Additionally, they were told the child they were receiving was a healthy child, and that the adoption subsidy program did not apply to them. Since the adoption was finalized, Benjamin has been identified as displaying the characteristics of a special needs child,

having been diagnosed with several mental disorders. It has been determined by Benjamin's doctors that these conditions and disorders existed at the time of Benjamin's placement.

While the family involved in ACFY-PIQ-88-06 had requested benefits before the adoption was final, the general principle should still apply. The Nierengartens were not fully informed of Benjamin's condition at the time of adoption, so a denial of benefits based upon timing is arbitrary and irresponsible.

Another interpretation, ACF-PIQ-92-02, issued June 25, 1992, was intended to clear up ambiguities left after the December 22, 1988 interpretation previously cited. The 1992 interpretation says it is the state agency's responsibility to inform the parents about the adoption assistance program, and that if adoption assistance is denied because it is erroneously determined the child does not meet eligibility criteria, a hearing finding that the state erred in its determination can reverse that determination. ACF-PIQ-92-02 states specifically,

> If applicants or recipients of financial benefits or service programs under titles IV-B or IV-E believe that they have been wrongly denied financial assistance or excluded from a service program, they have a right to a hearing. It is the responsibility of the fair hearing officer

> to determine whether extenuating circumstances exist and whether the applicant or recipient was wrongly denied eligibility.

Throughout this proceeding, the focus of the department and the courts has been on the timeliness of the applciation, and not on the extenuating circumstances. This flies in the face of the federal policy interpretation. The policy interpretation is directed to "State Agencies Administering or Supervising the Administration of Title IV-E of the Social Security Act, Indian Tribes and Indian Tribal Organizations," but Wisconsin has chosen to disregard the interpretation. ACF-PIQ-92-02 makes it the responsibility of the fair hearing examiner to determine whether there are extenuating circumstances, and whether eligibility was denied wrongly. This never occured in this proceeding. The focus has continually been on the timeliness of the application, and the extenuating circumstances and eligibility questions were never considered. Consequently, Wisconsin's obligations to the Nierengartens in administering the adoption assistance program have not been met.

The Nierengartens were told the adoption assistance program did not apply in their situation, and the program was not explained to them. The only written evidence in the record that the Nierengartens were ever advised of the availability of an adoption subsidy is a single line in the Agreement for Placement that reads, "The agency has

informed us that we may apply for a State Adoption Subsidy." When the Nierengartens were advised orally of the existence of the subsidy, they were told they would not qualify for the program. The statement that they would not qualify for the adoption assistance program was erroneous. Pursuant to the policy interpretations, these factors amount to extenuating circumstances.

The Nierengartens should be allowed to establish Benjamin is a special needs child and eligible for the adoption assistance program, despite the fact the adoption has been finalized.

While Wisconsin has interpreted its statute and rules not to allow consideration of extenuating circumstances, other states have interpreted their adoption assistance statutes and 42 U.S.C. § 673 to require extenuating circumstances to be taken into account. For an example, the District Court of Rhode Island allowed an assistance cause to be reopened based on extenuating circumstances. Ferdinand v. Dept. for Children and Their Families, 768 F. Supp. 401 (D.R.I. 1991). In that case, a minority child's special education needs were not evident at the time of her adoption, and the court concluded that it did not preclude her from being eligible for assistance as a hard to place child. Id.

If extenuating circumstances are considered as described in ACFY-PIQ-88-06 and ACF-PIQ-92-02, the Nierengartens would only

be gaining the same rights as parents whose child's special needs were recognized before the adoption was finalized. By denying adoption assistance if the request is not made before adoption is finalized, without considering the extenuating circumstances, Wisconsin is not encouraging the adoption of hard to place children.

As it stands now, Wisconsin and other states are able to ignore the federal policy interpretations of a state program required to be implimented by federal law. This is not just a matter of a state choosing to administer a program in a particular manner. This is a matter of a state choosing not to implement an essential element of a federally mandated program.

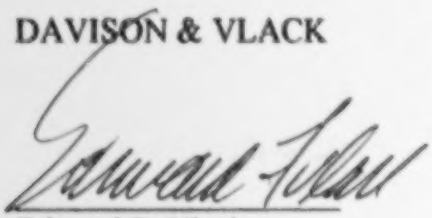
The Nierengartens are requesting that because the requirement under Wisconsin law that in order to qualify for adoption assistance, applications must be completed before the adoption is finalized, irregardless of any extenuating circumstances, is inconsistent with the purposes of 42 U.S.C. § 673 and the policy interpretations of the U.S. Department of Health and Human Services, the requirement should not continue to be applied without allowing the consideration of extenuating circumstances, and that the Court reverse and remit back with appropriate instructions.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the order and judgment of the Wisconsin Supreme Court, rendered in this proceeding on June 11, 1996.

Respectfully submitted this 6TH day of September, 1996.

DAVISON & VLACK



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CLERK

REMITTITUR DATE: JUNE 12, 1996

District 3
Case No. 95-3118-Ft
Trial Court Case No. 95-CV-99

John Nierengarten and Betty Nierengarten,
Petitioners-Appellants,
V.
State of Wisconsin, Department of Health and Social Services,
Respondents-Respondents.

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This cause was an appeal to review the order(s) of the Circuit Court of Pierce County.

IT IS ORDERED AND ADJUDGED by this court in an opinion filed on April 09, 1996 that:

Judgment affirmed.

Panel: Hon. Thomas Cane
Hon. Daniel L LaRocque
Hon Gordon Myse

The appeal and record is hereby returned to the Clerk of Circuit Court for Pierce County.

I certify that the above is a correct transcript of the original order and judgment of the court in the above cause.

Marilyn L Graves
Clerk of Court of Appeals

OFFICE OF THE CLERK
SUPREME COURT
231 E STATE CAPITOL
PO BOX 1688
MADISON, WISCONSIN 53701-1688

TO:

June 11, 1996

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Your are hereby notified that the Court has entered the following order:

No. 95-3118-FT Nierengarten v. DHSS L.C. #95CV99

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of petitioners-appellants-petitioners, John and Betty Nierengarten, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L Graves
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1996

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

JOHN NIERENGARTEN and
BETTY NIERENGARTEN,

Petitioners-Appellants,

v.

STATE OF WISCONSIN,
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. Affirmed.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. John and Betty Nierengarten appeal a judgment affirming a Department of Health and Social Services decision that the Nierengartens' adoption assistance application

was properly denied as untimely.[1] The Nierengartens raise three issues on appeal: (1) whether their adopted son, Benjamin, was eligible for adoption assistance at the time of his adoption; (2) whether foreign born children were excluded from the adoption assistance program at the time Benjamin was adopted; and (3) whether the trial court's decision was consistent with federal policy considerations and congressional goals. Applying the plain language of § 48.975, Stats., we conclude that application for adoption assistance was properly denied as untimely. We therefore affirm the judgment.

In April 1987, Lutheran Social Services of Wisconsin and Upper Michigan placed four-year-old Benjamin, who was born in Korea, with the Nierengartens for the purpose of adoption. When Benjamin was placed with the Nierengartens, they were advised they did not qualify for adoption assistance. In November 1987, Benjamin's adoption was finalized. after his adoption was finalized, Benjamin was diagnosed with bipolar, attention deficit hyperactivity disorder, post-traumatic stress disorder and mathematics disorder.

In August 1994, the Nierengartens applied for adoption

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[1]This is an expedited appeal under Rule 809.17, Stats.

assistance to assist with the financial exigencies in meeting Benjamin's medical needs. Their application was denied as untimely. The circuit court affirmed the DHSS's denial of their application.

We review the department's decision and not that of the circuit court. *Gibson v. State Public Defender*, 154 Wis. 2d 809, 812, 454 N.W. 2d 46, 47-48 (Ct. App. 1990). The scope of our review is prescribed by § 227.57 (5), Stats.: "The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law . . ."

Here, there is no dispute of underlying facts, and the issues presented require that we apply the statutory guidelines to a set of facts. The application of a statute to a set of facts presents a question of law that we review de novo. *Sheely v. DHSS*, 150 Wis. 2d 320, 328, 442 N.W. 2d 1, 5 (1989). The primary source of interpretation is the statutory language itself. *Hartlaub v. Coachman Indus.*, 143 Wis. 2d 791, 422 N.W. 2d 869, 871 (Ct. App. 1988). If the language is unambiguous, resort to extrinsic aid for purposes of statutory interpretation would be improper. *General Tel. v. A Corp.*, 147 Wis. 2d 461, 464, 433 N.W. 2d 264, 265 (Ct. App. 1988).

Here, the statutory language is unambiguous. Adoption assistance was created to assist the adoption of

special needs children by providing financial assistance to adoptive families. "'[A]doption assistance' means payments by the department to the adoptive or proposed adoptive parents of a child which are designed to assist in the cost of care of that child after an agreement under sub. (4) has been signed and the child has been placed for adoption with the adoptive or proposed adoptive parents." Section 48.975 (1), Stats. The application for adoption assistance must be made before the adoption is finalized. Section 48.975 (4), Stats., provides: "A written agreement to provide adoption assistance shall be made prior to legal adoption . . ." We conclude that the department correctly interpreted the law to require the application for adoption assistance be made before the adoption is finalized.

The Nierengartens argue that Benjamin would have qualified for adoption assistance at the time he was placed, that the law did not disqualify foreign born children, and that they were misinformed that they were not eligible. The Nierengartens do not contend that Lutheran Social Services deceived them or misrepresented the state of Benjamin's health. Their contention is that at the time his undiagnosed condition would have qualified him as a special needs child for whom adoption assistance would have been available, if they would have applied before the adoption was finalized. Although the

Nierengartens' contentions may be correct, they do not change the result, given our narrow scope of review. Our obligation under § 227.57, Stats., is to apply the plain and unambiguous language of the applicable statute. *Harris v. Kelley*, 70 Wis. 2d 242, 249, 234 N.W. 2d 628, 631 (1975). Section 49.975 (4), Stats., plainly requires that the application for adoption assistance be made before the adoption is finalized. Because it is undisputed that the application was made after the adoption was finalized, it was properly denied.

The Nierengartens also argue that interpretations of analogous federal law recognize extenuating circumstances that require a hearing after the adoption is final to reverse an improper agency denial of an adoption assistance application. However, they agree that in the federal interpretation, the family applied before the adoption was finalized. That is not the case here.

The Nierengartens also argue that the congressional goals of Title IV-E of the Social Security Act, which resulted in the creation of the adoption assistance program, would be met if extenuating circumstances were recognized to permit an untimely application. Our duty, however, is to ascertain legislative intent by virtue of the plain statutory language. Here, in § 48.975 (4), Stats., the unambiguous language

requires the application to be made before finalization of the adoption. The department's regulations pursuant to § 48.975 (5), Stats., are consistent with this interpretation. *Cf.* Wis. Adm. Code § HSS 50.04 (1) ("An application for adoption assistance shall be completed and approved before an adoptive placement occurs . . ."): § HSS 50.03 (3) (b) (application may be made after placement but before finalization is there is a change in needs).

The Nierengartens also cite *Ferdinand v. Department for Children & Their Families*, 768 F.Supp. 401 (D.R.I. 1991), which concluded that an adoptive family was not barred from adoption assistance although the adoptive child's special educational needs were not evident at the time of her adoption. Because the *Ferdinand* court was not interpreting our Wisconsin statutes, its result is not controlling.

By the Court. -Judgment affirmed.

This opinion will not be published. Rule 809.23 (1) (b) 5, Stats.

STATE OF WISCONSIN CIR CT PIERCE CTY

JOHN and BETTY NIERENGARTEN,

Petitioners,

vs. MEMORANDUM OPINION - 95CV99

STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondents.

On November 3, 1987, the adoption of Benjamin Nierengarten by John and Betty Nierengarten was finalized. On September 22, 1994, Lutheran Social Services, on behalf of the petitioners submitted a request to the Department of Health and Social Services, Bureau of Children, Youth and Families, requesting it provide them with adoption assistance through the adoption assistance program for Benjamin Nierengarten. The Wisconsin Department of Health and Social Services denied the petition for adoptive assistance on April 24, 1995. The petitioners seek review of that denial.

The hearing examiner's denial of petitioners' request for adoption assistance was based solely on the ground that the petitioners' request for adoption assistance was untimely.

Other issues were raised before the hearing examiner but the hearing examiner felt it unnecessary to resolve those factual disputes because the law required that he conclude the petitioners' request was untimely and therefore, other factual issues were not material as to whether the petitioner's request should be granted or denied. Petitioners ask for review of this decision raising many of the same issues that the hearing examiner chose not to decide because of his belief that the petitioners' request for adoption assistance was untimely.

Respondent asserts without contradiction that the Wisconsin Statute and Administrative Rules require that a petition for adoption assistance be filed at the latest before the adoption is finalized. It appears that petitioners' argument hinges on their assertion that federal policy interpretations of the United States Department of Health and Human Services create an exception to the clear language of the Wisconsin Statute and the Wisconsin Administrative Rules promulgated to implement the Wisconsin Statute regarding adoption assistance.

The court concludes that the policy interpretations by the United States Department of Health and Human Services only allow, not require, the states to consider petitions for adoption assistance after the adoption has been finalized. The

Wisconsin Statute and Administrative Rules are clear on their face that petitions for adoption assistance must be filed prior to the finalization of the adoption.

It seems as though the petitioners' argument is that the respondent should be estopped from relying on the Wisconsin Statute and Administrative Rules in denying their request for adoption assistance. Their argument seems to be that it is unfair to deny adoption assistance to adoptive parents who do not discover that the adoptive child has special needs until after the adoption is finalized or were is some way dissuaded from filing such a petition prior to the finalization of the adoption. However, no authority is cited by petitioners to support such an argument and petitioners do not contend or argue that the Wisconsin Statute or Administrative Rules are ambiguous and require interpretation as to when a petition for adoption assistance is timely.

The court would point out that, as respondents concede, the State could pass a law or administrative regulation that would permit petitions for adoption assistance to be filed after the adoption is finalized. It is this court's belief that the petitioners' remedy is to seek legislative assistance in changing Wisconsin law. However, this court concludes that the law of Wisconsin as it currently exists requires the

conclusion that petitioners' request for adoption assistance made after the adoption of their son was finalized is untimely and was, therefore, properly denied.

Based on the above opinion,

IT IS HEREBY ORDERED THAT the decision of the Wisconsin Department of Health and Social Services dated April 24, 1995, be affirmed.

Dated: September 13, 1995.

BY THE COURT:

Robert W. Wing
Circuit Court Judge

cc: Edward F. Vlack
Donald P. Johns

STATE OF WISCONSIN
DEPARTMENT OF HEALTH AND SOCIAL SERVICES

In the Matter of

Benjamin Nierengarten
c/o John & Betty Nierengarten
404 North Wasson Lane
River Falls, WI 54022

DECISION
AAP-47/#84876

PRELIMINARY RECITALS

Pursuant to a petition filed on November 10, 1994 under § 227.42, Stats., to review a decision of the Bureau of Children, Youth and Families denying a request for adoption assistance, a hearing was held on February 24, 1995 at Ellsworth, Wisconsin. Hearings are scheduled for December 13, 1994 and January 27, 1995 were postponed by agreement of the parties. That the record was held open until March 23, 1995 for the filing of briefs which have been received and have been considered by the examiner.

The issue for determination is whether a request for adoption assistance was properly denied.

There appeared at that time and place the following persons:

PARTIES IN INTERST: Petitioner:

Benjamin Nierengarten
c/o John and Betty Nierengarten
404 North Wasson Lane
River Falls, WI 54022

Edward F. Vlack, Atty at Law
Davison and Vlack
200 East Elm
River Falls, WI 54022

Wisconsin, Dept. of Health &
Social Services
Bureau of Children, Youth and
Families
1 W Wilson Street, Rm 458
PO Box 7851
Madison, WI 53707-7851
By: Therese Durkin, Atty
Office of Legal Counsel
1 W West Wilson St.,
Rm 651, PO Box 7851
Madison, WI 53707-7850

EXAMINER: William E Schorr, Atty
Department of Health & Social Services

FINDINGS OF FACT

1. That Benjamin Nierengarten is an adopted child who lives with his parents, John and Betty Nierengarten, hereinafter referred to as petitioner, are residents of Pierce County.

2. That on September 22, 1994, Lutheran Social Services, on behalf of the petitioner submitted a request to the Department of Health and Social Services, Bureau of Children, Youth and Families, requesting it provide them with adoption assistance through the adoption assistance program for Benjamin Nierengarten.

3. That the child was placed in the home through Lutheran Social Services. That Lutheran Social Services is an agency authorized to place children for adoption.

4. That the request for adoption assistance was denied by letter dated October 24, 1994.

5. That Benjamin's adoption was finalized on or about November 3, 1987.

DISCUSSION

The Bureau of Children, Youth and Families takes the

position that the denial was proper because the request for adoption assistance was timely made and that there is no showing that adoption assistance is necessary for the assurance of adoption. The petitioner takes the position that the child is a special needs child and because of these needs is eligible for adoption assistance. The petitioner also argues that they should be entitled to such assistance because they were never told by Lutheran Social Services of the availability of adoption assistance and consequently made no application therefor prior to the finalization of the adoption.

Sec. 48.975., Stats., provides as follows:

(1) Definition. In this section, "adoption assistance" means payments by the department to the adoptive or proposed adoptive parents of a child which are designed to assist in the cost of care of that child after legal adoption.

(2) Applicability. The department may provide adoption assistance only when it has determined that such assistance is necessary to assure the child's adoption. . . .

(3) Procedure. A written agreement to provide adoption assistance shall be made prior to legal adoption only for children in the guardianship of the department or other agency authorized to place children for adoption or for children in the guardianship of an American Indian tribal agency in this

state. The adoption assistance may be continued after the child reaches the age of 18 if that child is a full-time high school student.

(5) Rules. The department shall promulgate rules necessary to implement this section.

The administrative rules implementing the above statutory provision are found in Ch. HSS 50, Wis. Adm. Code. Section HSS 50.04 (1), Wis. Adm. Code, provides as follows:

(1) TIMING. An application for adoption assistance shall be completed and approved before an adoptive placement occurs, except under the circumstances noted in s. HSS 50.03 (3) (b).

Section HSS 50.03 (b), Wis. Adm. Code, provides that an application for adoption assistance may be made after the adoptive placement but before the finalization of the adoption if the needs of the child change or if there is a change in circumstances in the adoptive family.

A reading of the above material shows that an application for adoption assistance must be made with the department prior to the adoptive placement of the child. The only exception to this is if circumstances change and in that case, the application must be made prior to the finalization of

the adoption. Therefore, the outside limit for the filing of a request for adoption assistance is the finalization of the adoption. Failing to timely file the request places the request outside the authority to grant. Consequently, even if I would find that the child does not meet the criteria for adoption assistance, I would have to find that there is no authority to grant the request because the application was not timely filed.

CONCLUSIONS OF LAW

That the request for adoption assistance was properly denied.

NOW THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby denied.

REQUEST FOR NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistakein the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to Office of Administrative Hearings, PO Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named

in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in secs. 227.49 of the state statutes. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Department of Health and Social Services as respondent, PO Box 7850, Madison, WI 53707-7850

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

William E. Schorr, Attorney

Department of Health & Social Services

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Administration on Children, Youth and Families

POLICY INTERPRETATION QUESTION
ACF-PIQ-92-02

To: State Agencies Administering or Supervising the Administration of Title IV-E of the Social Security Act, Indian Tribes and Indian Tribal Organization.

SUBJECT: Clarification Regarding ACYF-PIQ-88-06, Dated December 2, 1988, and Situations Which Would Constitute "Extenuating Circumstances" for the Purpose of a Fair Meeting for Denial of Title IV-E Adoption Assistance

LEGAL AND RELATED REFERENCES:

Sections 473 (a) and (c), 471 (a) (12) and 1132 (a) of the Social Security Act, 45 CFR 1356.40 (b) (1), 45 CFR 95.7, ACYF-PIQ-83-4, Dated October 26, 1983 and ACYF-PIQ-88-06, Dated December 2, 1988

BACKGROUND:

Policy Interpretation Question, ACYF-PIQ-88-06, dated December 2, 1988, set forth conditions, after the finalization of an adoption, under which a State may reverse an earlier decision to deny title IV-E adoption assistance benefits, It stated that Federal regulations at 45 CFR 1356.40 (b)(1) require that the adoption assistance agreement be signed and in effect at the time of or prior to the final decree of adoption. However, if the adoptive parents were denied benefits and there are extenuating circumstances, the adoptive parents may request a fair hearing. The policy issuance goes on to state that, if the hearing determines that all of the facts relevant to the child's eligibility were not presented at the time of the request for assistance, the State may

reverse the earlier decision to deny benefits under title IV-E.

INTERPRETATION TO:

Questions raised with regard to what constitutes "extenuating circumstances" for the purpose of a fair hearing under the title IV-E adoption assistance program.

QUESTION 1:

The case situation described in ACYF-PIQ-88-O6 spoke to a child's medical condition which was not properly diagnosed prior to adoption as being grounds for a fair hearing. Would a change in Federal statute, regulation or policy constitute grounds for a fair hearing as well?

RESPONSE:

No. Changes in Federal statute, regulation or policy normally are effective only prospectively. Since the previous statute, regulation or policy is in effect until such a change is made, a change would not constitute grounds for a fair hearing.

QUESTION 2:

With respect to the State agency's responsibilities in the administration of the program, some concern has been expressed over the seeming paradox between notifying and advising prospective adoptive parents of the adoption assistance program and making a reasonable, but unsuccessful, effort to place a child without adoption assistance as required by section 473 (c) (2) (B) of the Social Security Act. Please clarify this issue.

RESPONSE:

In an effort to find an adoptive home for a children, the agency should first look at a number of families in order to locate the most suitable family for the child. Once the agency has determined that placement with a certain family would be the most suitable for the children, then

full disclosure should be made of the child's background, as well as known and potential problems. If the child meets the State's definition of special needs with regard to specific factors or conditions, then the agency can pose the question of whether the prospective adoptive parents are willing to adopt without a subsidy. If they say that they cannot adopt the child without a subsidy, the agency would meet the requirement in 473 (c) (2) (B) that there be a reasonable, but unsuccessful, effort to place the child without providing adoption assistance.

It was the intent of Congress, with the establishment of the adoption assistance program, to increase significantly the number of children placed in permanent homes. Thus, it is reasonable to conclude that it was not the intent of congress that a child remain unnecessarily in foster care while the agency "shops" for a family which might be less suitable but is willing to adopt the child without a subsidy, if it has already found a suitable place for the child.

QUESTION 3:

Would grounds for fair hearing exist if the State agency fails to notify or advise adoptive parents of the availability of adoption assistance for a child with special needs?

RESPONSE:

Yes. The very purpose of the title IV-E adoption assistance program is to encourage the adoption of hard-to-place children. State notification to potential adoptive parents about its existence is an intrinsic part of the program and the incentive for adoption that was intended by Congress. Thus, notifying potential adoptive parents is the State agency's responsibility in its administration of the title IV-E adoption assistance program. Accordingly, the State agency's failure to notify the parents may be consider an "extenuating circumstance" which justifies a fair hearing.

QUESTION 4:

Would ground for fair hearing exist if the State agency erroneously determines that a child ineligible for adoption assistance?

RESPONSE:

Yes. If the basis for denial or adoption assistance is the erroneous determination by the State that the child does not meet the eligibility criteria set forth in section 473 of the Act, the adoptive parents may request a fair hearing under section 471 (a) (12) of the Act. If the hearing determines that the State erred in its assessment of the child's eligibility for adoption assistance, the State may reverse the earlier decision to deny benefits under title IV-E.

QUESTION 5:

May a State establish policies defining the factual circumstances which constitute an extenuating circumstance for the purpose of a fair hearing?

RESPONSE:

It is permissible for States to have written guidance regarding the types of situations which would constitute the grounds for a fair hearing in order to assist fair hearing officers. However, State policies may not define the grounds for a fair hearing more narrowly than Federal policy. (See 45 CFR 205.10, ACYF-PIQ-83-4, dated October 26, 1983, and ACYF-PIQ-88-06, dated December 2, 1988, for guidance.) The types of situations which would constitute grounds for a fair hearing include: (1) relevant facts regarding the children, the biological family or child's background are know and not presented to the adoptive parents prior to the legalization of the adoption; (2) denial of assistance based upon a means test of the adoptive family; (3) erroneous determination by the State that a child is ineligible to advise adoptive parents of the availability of adoption assistance.

If applicants or recipients of financial benefits or service program

under titles IV-5 or IV-E believe that they have been wrongly denied financial assistance or excluded from a service program, they have a right to a hearing. If it the responsibility of the fair hearing officer to determine whether extenuating circumstances exist or whether the applicant or recipient was wrongly denied eligibility.

QUESTION 6:

May a State agency change its eligibility determination and provide adoption assistance based upon extenuating circumstances without requiring the applicant to obtain a favorable ruling in a fair hearing?

RESPONSE:

No. However, if the State and the parents are in agreement, a trial-type evidentiary hearing would not be necessary. The undisputed documentary evidence could be presented to the fair hearing officer for his or her review and determination on the written record.

QUESTION 7:

Who has the burden of proving extenuating circumstances and adoption assistance eligibility at a fair hearing?

RESPONSE:

The Federal statute does not address the point explicitly. We would expect States to conclude that the adoptive parents have the burden of proving extenuating circumstances and adoption assistance eligibility at a fair hearing. However, as stated in the previous response, if the State agency is in agreement that a family had erroneously been denied benefits, it would be permissible for the State to provide such facts to the family or present corroborating facts on behalf of the family to the fair hearing officer.

QUESTION 8:

After the legalization of an adoption, if a fair hearing determined that a

child has been wrongly denied benefits under the title IV-E adoption assistance program, what is the earliest date from which assistance may be provided?

RESPONSE:

Prior to the passage of the Tax Reform Act of 1986, the statute required that there be an interlocutory or final decree of adoption prior to receipt of adoption assistance. Therefore, after the effective date of a State's title IV-E State plan, the earliest date from which an adoption assistance may be provided is from the time of the interlocutory or final decree or adoption for those children adopted on or before October 1, 1986. As of October 1, 1986, with the passage of the Tax Reform Acto of 1986, the requirement that there be a interlocutory decree prior to providing adoption assistance was rescinded and adoption assistance payments may begin when the adoption assistance agreement is signed and the child is placed in the adoptive home.

If a State chooses to pay adoption assistance retroactively from the earliest date of the child's eligibility in accordance with Federal and State statutes, regulations and policies, the State may claim Federal financial participation for this expenditure. For cases in which there was not signed adoption assistance agreement, the earliest date of eligibility would be that of the interlocutory or final decree for assistance provided before October 1, 1986, or placement in an adoptive home for assistance provided after October 1, 1986. States should sign a new agreement backdated to the earliest date of eligibility for the child. The two-year restriction in section 1132 (a) of the Social Security Act applies to the date of claim for actual expenditures, and , thus, would not apply in this situation

Wade F. Horn, Ph.D
Commissioner

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Administration for Children, Youth and Families

POLICY INTERPRETATION QUESTION
ACFY-PIQ-88-06

To: State Agencies Administering or Supervising the Administration of Title IV-E of the Social Security Act and Indian Tribes and Indian Tribal Organizations.

SUBJECT: Eligibility for Title IV-E Adoption Assistance

STATEMENT OF PROBLEM: Region IV has asked a question on behalf of the State of Tennessee regarding the availability of adoption assistance through the Adoption Assistance Program under title IV-E of the Social Security Act. The question concerns a couple who recently adopted two children (siblings) through the Tennessee Department of Human Services who had been living with the family in foster care for about eight years prior to adoption. The parents requested adoption assistance for both children; however, Tennessee's definitions of a special needs sibling group is one which includes at least three children and the two girls were not eligible on this basis. The older child was determined eligible under the title IV-E program because of her age, but the other child was too young under the State's definition of "a child with special needs."

The parents notified the agency prior to the adoption that the younger child was experiencing neck and back pain. The child was taken to several doctors for a diagnosis which would

establish the child's eligibility for assistance; however, examining physicians were unable to make a diagnosis at that time and the request for assistance was denied. Later, after the adoptions of both children had been legalized, the younger child was diagnosed as have junior rheumatoid arthritis. The parents again requested adoption assistance for the child.

The State denied the parents' request, based on the Federal regulation (45 CPR 1356.40 (b) (1) requiring that the adoption assistance agreement be signed and in effect prior to the final decree of adoption in order to provide assistance under title IV-E.

The parents believe the denial was unfair because the child's medical condition was not properly considered and they also claim that they were not fully informed by the agency staff as to the eligibility requirements of the adoption assistance program. Additionally, the parents expressed fear that the State agency would deny the adoptions if they did not sign the legal papers when requested.

LEGAL AND RELATED REFERENCES:

Social Security Act, Sections 473 (a) and (c) and 471 (a) (12); 45 CFR 1356.40 (b) (1).

QUESTION: If the adoptive parents are able to prove to the State agency's satisfaction that all facts relevant to their request for adoption assistance were not presented at the time adoption assistance was discussed, may the State reverse an earlier decision to deny benefits under title IV-E?

ANSWER: Yes, under certain specified conditions. According to the Federal regulations at 45 CFR 1356.40 (b) (1), the adoption assistance agreement must be signed and in effect at the time of or prior to the final decree of adoption in order to provide assistance under title IV-E.

However, if there are extenuating circumstances, the adoptive parents may request a fair hearing under section 471 (a) (12) of the Act. If the hearing determines that all of the facts relevant to the child's eligibility were not presented at the time of the request for assistance, the State may reverse the earlier decision to deny benefits under title IV-E.

Dodie Truman Borup
Commissioner